Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1015

RALSTON PURINA COMPANY, ET AL. - Appellants

versus

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, ET AL. - - - - Appellees.

APPELLEES' PETITION FOR REHEARING

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LOUISVILLE AND NASHVILLE RAILROAD COMPANY, ET AL. - - - - *Appellees.*

APPELLEES' PETITION FOR REHEARING

Pursuant to Rule 58 of the Rules of this Court, Appellees hereby petition the Court for rehearing of the Court's order herein entered June 14, 1976. As grounds for this petition, Appellees show the Court as follows:

This is an appeal from the judgment of a three-judge District Court setting aside and annulling a decision and order of the Interstate Commerce Commission in *Louisville & N. R.R.* v. *United States,* 397 F. Supp. 607 (W.D. Ky. 1975).

In its decision the Commission held the proposed transit rule change to be unjust and unreasonable on the ground that it would result in a diversion of both feed and soybean meal traffic from the railroads. From this, the Commission concluded would follow "a net loss of revenue to the [railroads] despite the assess-

ment of higher rates and charges and thus will be self-defeating."

Appellees attacked this finding as lacking the necessary support of substantial evidence of record. Appellees' attack is based upon the fact that the conclusion as to loss of revenue *can only relate to a net loss of gross revenue.* The first part of the Commission's conclusion only states that the railroads will lose the gross revenue from the traffic lost. Certainly, the railroads concede that if traffic is lost, there will be a loss of gross revenue on such traffic as may be diverted. The railroads do not concede, however, that the loss of such revenue will be "self defeating," as stated by the Commission. The conclusion that the loss of gross revenue will be self-defeating *assumes* that the traffic lost is profitable traffic and that its loss will result in a dimunition of profits to the railroads. This assumption goes to the very heart of the Commission's conclusion, for without it there is no basis for the assertion that the rule change will be "self defeating." It is this assumption that is completely without evidentiary support in the record before the Commission, and it is for this reason the Commission's decision must fail to meet the requirements of the law.

The lower court correctly recognized this fatal defect in the Commission's conclusion. *Ibid.* at 610. The lower court found there to be no evidence to support a conclusion that there would be a loss of profits should there be a diversion of traffic as predicted. The lower court went on to find that the *only* evidence on the profitability of the traffic was uncontroverted (*ibid.*)

and showed the loss of feed traffic would be helpful to the railroads, since such traffic is unprofitable.

This Court reversed the lower court on the ground that the lower court reweighed the testimony and thus exceeded its function. Appellees submit this Court erred in that decision. This Court's reasoning suffers the same deficiency as the Commission's ill-founded conclusion: it assumes, without evidence, that a loss of traffic and thus a loss of *gross* revenue will also result in a loss of profits. There is simply no evidence in the record below to show that the traffic is profitable. The only evidence on profitability was introduced by Appellees and that evidence related to the feed traffic only because the proposed rule change relates only to feed. That evidence shows that feed traffic is unprofitable to Appellees. Appellants introduce *no* evidence in rebuttal and this evidence of unprofitability stands. Further, there is *no* evidence below as to whether the meal traffic is profitable or unprofitable. Yet the Commission's conclusion, to be valid, *must* assume that the meal traffic is profitable, since it cannot possibly be asserted that the feed traffic is profitable. Thus, the key to the Commission's conclusion (and this Court's affirmance thereof) is the totally unfounded assumption that a loss of meal traffic will result in a loss of profits to the railroads. It is this assumption that is totally lacking the requisite support of substantial evidence. This is so because there is no evidence whatsoever on the question of meal traffic profitability. The Commission's conclusion and assumption, therefore, cannot possibly be supported by substantial evidence because

there is simply no evidence on the point. This is the precise holding of the lower court (*ibid.*) and it is correct in all respects. On the record below, there could be no other holding. The lower court did not rely on the Appellees' evidence to disagree with the Commission. The lower court simply referred to Appellees' uncontroverted evidence as to unprofitable feed traffic in holding that there was no substantial evidence before the Commission to support a contrary assumption. It would appear that this Court mistakenly viewed the lower court's reference to a complete lack of evidence as to loss of profits as if the lower court weighed the evidence. The lower court could not have weighed the evidence as to profitability of meal traffic since there is no evidence on this point. As to the feed traffic, the lower court simply found that the *only* evidence as to profitability was Appellee's and it showed the traffic to be unprofitable. Surly, the lower court cannot be held to have weighed evidence when such evidence is unrebutted.

The holding and language of the lower court are very similar to the decision in *Malone Freight Lines* v. *United States,* 143 F. Supp. 913 (N. D. Ala. 1956). In that case the Commission ordered the plaintiff motor carrier to maintain a rate on certain commodities higher than the rail rate on the same commodities, finding the rail rate just and reasonable and the proposed lower motor carrier rate unjust and unreasonable. On appeal, the district court held the finding as to the motor carrier rate to be unsupported by the evidence, stating:

> "The latter finding [as to the motor carrier rate] is not only not sustained by the evidence but is contrary to the evidence. There is no basis in the evidence for the application of different rates. The evidence sustains the plaintiff's proposed $1 rate as just, reasonable and compensatory. The conclusions of the Commission to the contrary are not supported by substantial evidence, and from a review of the whole evidence the court concludes that a judgment should be entered (permanently enjoining the Commission decision)." *Ibid.* at 916.

This case has not been reversed or overruled. The similarities between the above-quoted language and the opinion of the lower court here are striking. In both cases, it is clear that the court determined that the Commission's decision lacked the support of substantial evidence. That is the essential holding insofar as the court is concerned. But both courts understandably went on to note that the Commission finding was contrary to the evidence. This does not mean the courts weighed the evidence. Rather, it simply shows the courts' familiarity with the record. It is quite natural, in the absence of *any* evidence to support a finding, to say that the finding is contrary to the evidence, as was done by both the lower court here and the court in the *Malone* case. The lower court did not reweigh the evidence. It simply found no evidence to support the Commission's conclusion and went on to note that the finding was indeed contrary to the only evidence of record on that particular point.

An affirmative assumption as a part of a Commission conclusion must have the support of substantial

evidence in the record before the Commission. *Florida* v. *United States,* 282 U. S. 194 (1941). Here a Commission conclusion hinges solely upon an assumption of profitability on which there is no evidence below. Thus, the entire conclusion must fall as lacking the support of substantial evidence.

For the foregoing reasons, Appellees respectfully petition this Court to rehear this matter and, on rehearing, enter an order affirming the judgment of the three-judge Dstrict Court setting aside and annulling the decision and order of the Commission.

Respectfully submitted,

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July, 1976

CERTIFICATE OF COUNSEL

As Counsel for Appellees, I hereby certify that this Petition for Rehearing is presented in good faith and not for delay.

/s/ Fred R. Birkholz

Counsel for Appellees